BLANK

PAGE

BLANK

PAGE

INDEX

231-261—66——1

CITATIONS

Cases—Continued

Cases—Continued

Miscellaneous:

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 29

Z. T. OSBORN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 47–66) is reported at 350 F. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1965 (R. 66). A petition for rehearing was denied on October 8, 1965 (R. 67). The petition for certiorari was filed on November 5, 1965, and was granted on January 31, 1966 (R. 68; 382 U.S. 1023). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a recording of petitioner's conversation with an informant, which had been made with the authorization of two district judges, was properly admitted in evidence.

2. Whether petitioner was entrapped as a matter of law.

3. Whether the trial court erred in the admission of evidence and in its instructions regarding the defense of entrapment.

4. Whether petitioner's efforts to bribe a juror constituted an offense although his supposed confederate did not intend to pass the bribe.

STATUTE INVOLVED

18 U.S.C. 1503 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, * * * or corruptly or by threats or force, or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted after a trial by jury in the United States District Court for the Middle District of Tennessee on one count charging a violation of 18 U.S.C. 1503, in that during the period from approxi-

mately November 6 to 15, 1963, he corruptly endeavored to influence, obstruct and impede the due administration of justice in a prospective federal criminal trial by requesting, counseling and directing one Robert D. Vick to communicate with Ralph A. Elliott, a member of the petit jury venire, and to offer him the sum of $10,000 to vote for acquittal.[1] He was sentenced to imprisonment for a period of three and a half years and to pay a fine of $5,000. The court of appeals affirmed (R. 47–66).

1. The evidence against petitioner on the count of which he was convicted consisted principally of the testimony of Vick—corroborated by a tape recording of one of petitioner's conversations with Vick—and of petitioner's admissions made to the district judges when he was confronted with the recording:

a. Robert Vick, a member of the Nashville Police Department, had been employed by petitioner to investigate the background of jurors prior to and during a federal criminal trial of James R. Hoffa in Nashville, Tennessee (R. 192a–193a). That trial was held between October 22 and December 23, 1962, and petitioner was one of Hoffa's attorneys. After that trial was over, a grand jury conducted an investigation of alleged obstructions of justice in the course of the Nashville trial and returned an indictment against Hoffa and others on May 9, 1963. Hoffa again retained petitioner as one of his counsel.

[1] The indictment contained two other counts charging similar offenses with respect to an earlier trial of James R. Hoffa, who was one of the defendants in the prospective trial. The government dismissed count 3, and petitioner was acquitted on count 2.

Vick was once more employed by petitioner to investigate jurors in preparation for the trial of the obstruction-of-justice charges (R. 197a). On November 7, 1963, petitioner and Vick were in petitioner's office discussing the jurors. Vick then said that he knew some of the jurors on the panel. Petitioner "jumped up" and said, "You do? Why didn't you tell me?" Fearing that the office might be "bugged," they then went outside and discussed the matter in the alley. Vick told petitioner that a prospective juror, Ralph Elliott of Springfield, was a cousin of his. Petitioner told Vick to go to Springfield and talk with Elliott to see what, if any, arrangements could be made about the case (R. 198a–201a).

Unknown to petitioner, Vick had several months previously communicated with Walter Sheridan of the Department of Justice (see pp. 17–19, *infra*). He reported the above conversation to Sheridan and was requested to put the information in the form of an affidavit (R. 383a, 653a–655a). The affidavit was shown by government attorneys on November 8 to Judges William E. Miller and Frank Gray, Jr., the two District Judges for the Middle District of Tennessee (R. 655a–661a). They authorized government agents to affix a recorder to Vick's person, under proper surveillance, so as to determine from recordings of further conversations between Vick and petitioner whether the charges in the affidavit were true or false (*ibid.*) An F.B.I. agent thereupon attached a tape recorder with adhesive tape to Vick's back, with microphones at each shoulder (R. 202a). Vick then returned to petitioner's office. Again

petitioner and Vick went outside to talk and they discussed the juror "and the fact that [petitioner] wanted him on his side, and how much it would take * * *" (R. 203a). Petitioner told Vick to let Elliott state the amount he would need and then to double it— *i.e.*, if Elliott mentioned $5,000, Vick was to offer him $10,000. Vick then returned to the F.B.I. agents, who discovered that the recording device had not operated properly. Vick made a written statement of what had occurred (R. 201a–205a).

On Veterans' Day, November 11, a recorder was again strapped to Vick's back, and he went to see petitioner at his office. On this occasion, the recorder worked, and the following conversation was recorded on tape (R. 741a–749a):

GIRL. You can go in now.

VICK. O.K., honey.

Hello, Mr. Osborn.

OSBORN. Hello, Bob, close the door, my friend, and let's see what's up.

VICK. How're you doing?

OSBORN. No good. How're you doing?

VICK. Oh, pretty good. You want to talk in here?

OSBORN. How far did you go?

VICK. Well, pretty far.

OSBORN. Maybe we'd better . . .

VICK. Whatever you say. Don't make any difference to me.

OSBORN. (Inaudible whisper.)

VICK. I'm comfortable, but er, this chair sits good, but we'll take off if you want to, but

OSBORN. Did you talk to him?

VICK. Huh?

OSBORN. Did you talk to him?

VICK. Yeah. I went down to Springfield Saturday morning and talked to or

OSBORN. Elliott?

VICK. Elliott.

OSBORN. (Inaudible whisper.)

VICK. Huh?

OSBORN. Is there any chance in the world that he would report you?

VICK. That he will report me to the FBI? Why of course, there's always a chance, but I wouldn't get into it if I thought it was very, very great.

OSBORN. Laughed.

VICK. You understand that.

OSBORN. (Laughing). Yeah, I do know. Old Bob first.

VICK. That's right. Don't worry. I'm gonna take care of old Bob and I know, and of course I'm depending on you to take care of old Bob if anything, if anything goes wrong.

OSBORN. I am. I am. Why certainly.

VICK. Er, we had coffee Saturday morning and now he had previously told you that it's the son.

OSBORN. It is?

VICK. Yes, and not the father.

OSBORN. That's right.

VICK. The son is Ralph Alden Elliott and the father is Ralph Donnal. Alden is er—Marie, that's Ralph's wife who killed herself. That was her maiden name, Alden, see? Anyway, we had coffee and he's been on a hung jury up here this week, see?

OSBORN. I know that.

VICK. Well, I didn't know that but anyway, he brought that up so he got to talking about

the last Hoffa case being hung, you know, and some guy refusing $10,000 to hang it, see, and he said the guy was crazy, he should've took it, you know, and so we talked about and so just discreetly, you know, and course I'm really playing this thing slow, that's the reason I asked you if you wanted a lawyer down there to handle it or you wanted me to handle it, cause I'm gonna play it easy.

OSBORN. The less people, the better.

VICK. That's right. Well, I'm gonna play it slow and easy myself and er, anyway, we talked about er, something about five thousand now and five thousand later, see, so he did, he brought up five thousand see, and talking about about [*sic*] how they pay it off you know and things like that. I don't know whether he suspected why I was there or not cause I don't just drop out of the blue to visit him socially, you know. We're friends, close kin, cousins, but I don't ordinarily just, we don't fraternize, you know, and er, so he seemed very receptive for er, to hang the thing for five now and five later. Now, er I thought I would report back to you and see what you say.

OSBORN. That's fine! The thing to do is set it up for a point later so you won't be running back and forth.

VICK. Yeah.

OSBORN. Then tell him it's a deal.

VICK. It's what?

OSBORN. That it's a deal. What we'll have to do—when it gets down to the trial date, when we know the date, tomorrow for example if the Supreme Court rules against us, well, within a week we'll know when the trial comes. Then

he has to be certain that when he gets on, he's got to know that he'll just be talking to you and nobody else.

VICK. Social strictly.

OSBORN. O yeah.

VICK. I've got my story all fixed on that.

OSBORN. Then he will have to know where to, he will have to know where to come.

VICK. Well, er . . .

OSBORN. And, he'll have to know when.

VICK. Er, do you want to use him yourself? You want me to handle it or what?

OSBORN. Uh huh. You're gonna handle it yourself.

VICK. All right. You want to know it when he's ready, when I think he's ready for the five thousand. Is that right?

OSBORN. Well no, when he gets on the panel, once he gets on the jury. Provided he gets on the panel.

VICK. Yeah. Oh yeah. That's right. That's right. Well now, he's on the number one.

OSBORN. I know, but now . . .

VICK. But you don't know that would be the one.

OSBORN. Well, I know this, that if we go to trial before that jury he'll be on it but suppose the government challenges him over being on another hung jury.

VICK. Oh, I see.

OSBORN. Where are we then?

VICK. Oh, I see. I see.

OSBORN. So we have to be certain that he makes it on the jury.

VICK. Well now, here's one thing, Tommy. He's a member of the CWA, see, and the Teamsters, or

OSBORN. Well, they'll knock him off.

VICK. Naw, they won't. They've had a fight with the CWA, see?

OSBORN. I think everything looks perfect.

VICK. I think it's in our favor, see. I think that'll work to our favor.

OSBORN. That's why I'm so anxious that they accept him.

VICK. I think they would, too. I don't think they would have a reason in the world to. I don't think that I'm under any surveillance or suspicion or anything like that.

OSBORN. I don't think so.

VICK. I don't know. I don't frankly think, since last year and since I told them I was through with the thing, I don't think I have been. Now Fred,

OSBORN. I don't think you have either.

VICK. You know Fred and I may not (pause), he may be too suspicious and I may not be suspicious enough. I don't know.

OSBORN. I think you've got it sized up exactly right.

VICK. Well, I think so.

OSBORN. Now, you know you promised that fella that you would have nothing more to do with that case.

VICK. That's right.

OSBORN. At that time you had already checked on some of the jury that went into Miller's court. You went ahead and did that.

VICK. Well, here's another thing, Tommy.

OSBORN. ——— ——— ——— church affiliations, background, occupation and that sort of thing on those that went into Miller's court. You didn't even touch them. You didn't even

investigate the people that were in Judge Gray's court.

VICK. Well, here's the thing about it, Tommy. Soon as this damn thing's over, they're gonna kick my ——— out anyway, so probably Fred's too. So, I might as well get out of it what I can. The way I look at it. I might be wrong cause the Tennessean is not gonna have anything to do with anybody that's had anything to do with the case now or in the past, you know that. Cause they're too close to the Kennedy's.

OSBORN. All right, so we'll leave it to you. The only thing to do would be to tell him, in other words your next contact with him would be to tell him if he wants that deal, he's got it.

VICK. O. K.

OSBORN. The only thing it depends upon is him being accepted on the jury. If the government challenges him there will be no deal.

VICK. All right. If he is seated.

OSBORN. If he's seated.

VICK. He can expect five thousand then and

OSBORN. Immediately.

VICK. Immediately and then five thousand when it's hung. Is that right?

OSBORN. All the way, now!

VICK. Oh, he's got to stay all the way?

OSBORN. All the way.

VICK. No swing. You don't want him to swing like we discussed once before. You want him

OSBORN. Of course, he could be guided by his own b———, but that always leaves a question. The thing to do is just stick with his crowd. That way we'll look better and maybe

they'll have to go to another trial if we get a pretty good count.

VICK. Oh. Now, I'm going to play it just like you told me previously, to reassure him and keep him from getting panicky, you know. I have reason to believe that he won't be alone, you know.

OSBORN. You assure him of that. 100%.

VICK. And to keep any fears down that he might have, see?

OSBORN. Tell him there will be at least two others with him.

VICK. Now, another thing, I want to ask you does John know anything. You know, I originally told John about me knowing.

OSBORN. He does not know one thing.

VICK. He doesn't know. O.K.

OSBORN. He'll come in and recommend this man ——— and I'll say well just let it alone, you know.

VICK. Yeah. So he doesn't know anything about this at all?

OSBORN. Nothing.

VICK. Now he hasn't seen me. When I first came here he was in here, see.

OSBORN. ———We'll keep it secret. The way to keep it safe is that nobody knows about it but you and me ———where could they ever go?

VICK. Well, that's it, I reckon, or I'll probable go down there. See, I'm off tonight. I'm off Sunday and Monday, see. That's why I talked to you yesterday. I had a notion to go down there yesterday cause I was off last night and I'm off again tonight.

231-261—68——2

OSBORN. It will be a week at least until we know the trial date.

VICK. O.K. You want to hold up doing anything further till we know.

OSBORN. Unless he should happen to give you a call and ——— something like that, then you just tell him, whenever you happen to run into him.

VICK. Well, he's not apt to call, cause see

OSBORN. You were very circumspect.

VICK. Yeah. We haven't talked really definite and I think he clearly understands. Now, he might, it seemed to me that maybe he thought I was joking or, you know.

OSBORN. That's a good way to leave it, he's the one that brought it up.

VICK. That's right.

OSBORN. ———

VICK. Well, I knew he would before I went down there.

OSBORN. Well, ———

VICK. Huh?

OSBORN. I'll be talking to you.

VICK. I'll wait a day or two.

OSBORN. Yeah. I would.

VICK. Before I contact him. Don't want to seem anxious and er

OSBORN. ———

VICK. O. K. See you later.

* * * * *

Vick testified regarding the substance of the conversation (R. 205a–207a). The tape was played for the jury and a copy of the transcript was shown to each member (R. 210a–212a). Petitioner testified that the tape recording of his conversation with Vick was substantially accurate (R. 426a).

b. Also read to the jury at petitioner's trial were the transcripts of three sessions pertaining to petitioner's disbarment held in the Middle District of Tennessee. After receiving and hearing the tape recordings, the two judges of the district requested petitioner to appear before them.[2] He did so on November 15, 1963 (R. 371a). He was advised that the court had received substantial information "indicating a plan to tamper [with the petit jury panel] in connection with the [upcoming] Hoffa case" and that specific acts had been committed in furtherance of that plan (R. 372a). After being reminded of his right to counsel and to keep silent, petitioner was asked whether he had any information concerning this plan. He denied having any such information or attempting to communicate with anyone for that purpose. Petitioner then asserted that he had been "extraordinarily careful" in his dealings with those whose work "would even bring them close to the jury" not to permit any such implication (R. 373a). Although Judges Miller and Gray refused at this time to disclose the specific evidence they possessed, they advised petitioner that it was "substantial" proof that "an important attempt has been made on your part to contact and improperly influence a juror by the name of Elliott" (R. 375a). Petitioner replied that he had not engaged in any attempt improperly to influence Elliott (R. 377a). He was advised that a show cause order would be entered and he would be

[2] The judges disqualified themselves from petitioner's criminal trial, which was presided over by Judge Marion S. Boyd, of the Western District of Tennessee (R. 115a).

given an opportunity to respond to the evidence on November 25. Petitioner was given the option of a closed or open hearing, and he chose the former (R. 377a–379a).

On the following day, November 16, petitioner appeared with counsel in the chambers of Judge Gray. He requested information concerning the basis for the show cause order which had been issued (R. 382a). Judge Gray advised him that Vick had supplied an affidavit on November 8, and that the judges had thereafter authorized the government to send Vick back with a tape recorder strapped to his person. Petitioner was advised that the judges had been furnished with a transcript of a tape recording of the conversation of November 11 and had heard the recording itself (R. 383a–384a).

On November 19, 1963, petitioner appeared at his own request before Judge Miller in lieu of a hearing on the show cause order (R. 385a–386a). After stating that no promises or inducements had been made to him by any person and that his statement was completely voluntary, petitioner said that he owed the court a full and complete statement and that he thought the best thing to do was to disclose the entire incident chronologically (R. 387a). He said that on or about November 1, Vick, who had been harassed because of his services in connection with the earlier trial, asked for further employment, saying that he was going to lose his job anyway when the then impending Hoffa trial was over. Petitioner said that he needed to complete his analysis of the jury panel as to race, employment and religion, as he planned

a challenge to the array, and gave Vick the last seventy-five names to investigate. Vick thanked him and said, "Tom, I have a cousin on that jury. Should I talk with him?" Petitioner told him not to do so, that he had been in trouble enough (R. 388a–389a).

Either during that meeting or during a subsequent one, according to petitioner's account, Vick asked to talk with petitioner outside. When they went outside, Vick said that his cousin was a member of the Communications Workers of America and that he "could talk to this man and see what he would do on the jury" (R. 390a). Petitioner stated that he told Vick not to do so and that if the juror was a union man he would probably be challenged by the prosecutor. Vick then asked if it would be all right for him to talk to his cousin if he should happen to run into him. Petitioner, maintaining that he "was susceptible to this thing. I was conditioned for it," told Vick that he did not suppose there would be any harm in that (389a–390a). About three days later, Vick reported that he had talked with his cousin. The cousin had said that the juror in the earlier Hoffa trial who had turned down $10,000 was a fool and that he would have taken the money. Petitioner told Judge Miller that he replied to this that "[i]f anybody were really going out to try to bribe a juror they wouldn't * * * just walk up and say I will give you $10,000.00. * * * What any sensible person would do would be to not be the aggressor to try to fix a figure. * * * you would have to feel your way and if they said they wanted $1,000, you could agree to $1,000, * * * then the way to do it would be to say,

well, we'll give you $1,000, when you are seated and give you $1,000 when the trial is concluded. * * * Now, that is the only way that it would be done." (R. 391a–392a).

According to petitioner's version, Vick said, as he left, that he was going to talk to the juror and petitioner responded, "Don't go talk to him. Don't rush the thing. You are going to draw attention to himself and to you" (R. 392a).

Vick returned, petitioner said, about three days later, saying that his cousin wanted $10,000, $5,000 to be paid when he was seated and $5,000 when the trial was over. Petitioner replied, "Well, now, that is all right." Then they talked generally about the jury and perhaps petitioner said some things to encourage Vick's cousin to make a deal. Petitioner also said he told Vick, "Now tell him not to worry. That there will be other people with him on the jury" (392–393a). Petitioner also said that there was no general plan to approach jurors. Judge Miller inquired what petitioner meant by his reference to "other people." Petitioner explained that this was said to encourage the cousin "to make a deal," but that it was a lie since he had no way of knowing who was going to be on the jury. When asked whether he intended to carry out the bribery of the juror, petitioner said that his thinking had not reached the question of what to do if the juror were seated. He denied that he had any intention of seeing it through, but hoped and prayed that he himself would "come to [his] senses" and challenge the man. Petitioner asserted that he

was so exhausted from the prior trial that he was "susceptible" to Vick's suggestion (R. 396a–398a).

c. At his trial, petitioner's testimony regarding his meetings with Vick was substantially similar to the version he had told Judge Miller. See R. 460a–466a. He explained that he had denied having these conversations with Vick when he first appeared before the judges because he was trying to protect Vick (R. 467a–468a). Petitioner also testified that Vick had reported to him that he had been harassed by the government for his investigative work during the prior trial, and that he had promised Walter Sheridan of the Department of Justice that he would no longer work for petitioner (R. 456a–458a). Petitioner said that Vick came to him on October 28, 1963, and "begged" for a job, and that he was then assigned 75 jurors to investigate (R. 458a). It was then, according to petitioner's testimony, that Vick said he had a cousin on the jury list, and that petitioner told him not to talk to the cousin (R. 459a–460a).

2. Vick testified that in the summer of 1963 he had been employed by the police department of the City of Nashville at the city's workhouse. He was advised that because of the private investigations he had done during the 1962 trial he would not be reemployed when the workhouse staff was transferred to the sheriff's office under the recently adopted metropolitan form of government (R. 214a–216a). He arranged to speak with Walter Sheridan of the Department of Justice. When they met, the first thing Sheridan asked Vick was whether "they were going to attempt to tamper with the jury that was going to

try Mr. Hoffa * * *" (R. 215a). Vick inquired whether Sheridan believed that "they had tampered with the last one * * *." When Sheridan replied that he did, Vick responded, "Well, that should be sufficient answer for you." Sheridan then asked Vick to tell him if he knew of any violations of law. Vick then related that an attempt had been made during the earlier trial to communicate, through a lawyer named Beard, with the husband of a juror in that case (see pp. 20–21, *infra*). After providing this information, Vick asked whether he could "get a clean bill of health from the Government" for purposes of his city employment.[3] Sheridan responded affirmatively (R. 215a–216a).

During the same meeting, Sheridan asked Vick to report to him any information concerning illegal activities of which he might become aware (R. 166a, 216a). Sheridan specifically told Vick that he was not interested in information other than that concerning illegal activities (R. 166a, 199a, 215a). Vick did not tell Sheridan that he was going to do anything, nor did Sheridan request him to become a federal employee or to do anything other than report illegal activities (R. 226a–227a). The instruction that he was to report nothing other than illegal activities was given to Vick on each occasion when he and Sheridan met (R. 167a). Vick was not paid or promised anything for the information he provided (R. 214a, 230a).

---

[3] Vick explained in cross-examination that the sheriff had told him that "something might come out [because of his participation in the Hoffa case] that would cause a bad reflection on the Sheriff's Office" (R. 221a).

Vick and Sheridan met on two or three other occasions in August or September 1963 (R. 167a). On November 7, 1963, Vick called Sheridan in Washington with the information concerning petitioner's request to him that he see juror Elliott and "get him on our side" (R. 201a, 217a). Sheridan immediately came to Nashville (R. 167a).

Vick stated on cross-examination that he had reported to an F.B.I. agent in February 1963—several months before his first meeting with Sheridan—that another investigator and he had made a trip to Columbia, Tennessee, in connection with an investigation dealing with the background of the foreman of the grand jury (R. 250a, 253a). He also testified that on June 3, 1963, he had advised the Federal Bureau of Investigation that he had been hired by petitioner to work on the forthcoming Hoffa trial (R. 256a–257a). Vick denied that his employment with petitioner was part of an arrangement with the government, but testified that he had offered in June 1963 to supply information in exchange for protection from prosecution (R. 258a–259a). The F.B.I. responded that since he was in the employ of an attorney for indicted defendants, it would not solicit information from him or direct his activities (R. 251a).[4]

---

[4] Vick did not, as petitioners assert, deny that "he had [any] connection with the Department of Justice until November" (Pet. Br. 6–7). What he did say was to deny that he became a "government agent in May of 1963" (R. 142a), a statement which is entirely consistent with our summary above. See also R. 226a, where Vick testified that he was not sure that he had "ever been a government agent."

3. Petitioner was acquitted on count two of the indictment (see note 1, *supra*), but since the evidence introduced with respect to that count relates to some of the issues raised here, we summarize it briefly:

Harry Beard, formerly a member of the Tennessee bar practicing in Lebanon, Tennessee, testified that, prior to the 1962 Nashville trial, he had been hired by the defense to make an investigation of the background of the jury panel (R. 11b–14b). After the trial began, he met with Vick and with Fred Ramsey, another investigator who had been doing similar work for the defense. *Inter alia,* they discussed Mrs. Harrison, who was a juror in the Nashville trial. At the suggestion of Ramsey and Vick, Beard visited petitioner at his office (R. 15b–16b). After an exchange of pleasantries, Beard told petitioner "that some of them on the jury would ruin him on the case, because some of the people were highly prejudicial one way or the other." Petitioner asked whether Beard knew Mr. Harrison. When Beard said he did, petitioner asked if Beard would see Mr. Harrison and tell him that if he would get his wife to vote for acquittal, petitioner would give him $10,000 (R. 16b–17b). Beard testified he was "astounded and appalled," but replied that he would see about the situation. A day or two later, to extricate himself from the matter, Beard told petitioner that he had been unable to see Harrison. Petitioner responded that there were "a lot of people interested in Mr. Hoffa being acquitted." Thereafter, without seeing Harrison, Beard returned to petitioner and represented that Harrison

wanted $50,000, a sum which Beard believed would be refused (R. 18b). Petitioner's reply was, "I will have to see Mr. Hoffa." Two or three days later, petitioner told Beard that Hoffa would not agree, and Beard responded, "Fine. Forget it" (R. 19b). Beard testified that he did not disclose these discussions with petitioner to the court because he was afraid for his own safety and that of his family (R. 17b–19b). Vick also testified that he and Ramsey had talked with Beard about the Harrisons in order to get Beard to talk to Harrison about his wife's voting for acquittal or seeing to it that there was a hung jury (R. 42b–44b).

Petitioner testified that he had spoken to Beard about the Harrisons to determine whether it was true that Mr. Harrison was an alcoholic. According to petitioner's testimony, Beard said, in the course of the conversation, "You can guarantee Mrs. Harrison for $20,000" and petitioner responded by pointing out that the jury was sequestered and could not be reached. Beard, according to petitioner's testimony, returned on later occasions with similar offers, each of which petitioner rejected (R. 491a–497a).

SUMMARY OF ARGUMENT

I

Petitioner's objections to the admission of the tape recording were correctly overruled by the district court. Vick had been invited into petitioner's office, and petitioner concedes that he was free to divulge the contents of their conversation. The recording which was introduced in evidence merely corroborated

Vick's voluntary disclosures and testimony concerning petitioner's statements to him. The device recorded no more than what Vick said and heard and it did not, therefore, invade the privacy of the office to any greater extent than did Vick himself. While the basic issue regarding the lawfulness of the recording was settled by *Lopez* v. *United States,* 373 U.S. 427, this case is even stronger than *Lopez* because judicial authorization was sought and obtained before the recording was made.

In authorizing the recording, the district judges were doing no more than a judicial officer does whenever he determines whether there is probable cause to arrest or search. Moreover, since this case involved an officer of the court and the integrity of a prospective trial, the judges had a particular obligation to determine whether Vick's allegations were truthful. They acted with no impropriety whatever when they authorized the recording and subsequently—as part of a disbarment proceeding—listened to the recording and interrogated petitioner. And since both of the district judges disqualified themselves from presiding at petitioner's trial, there can be no contention that the trial was unfair.

II

According to Vick's testimony, which the jury was entitled to believe, he said no more to petitioner before petitioner made the suggestion that he engage in an unlawful approach than that he knew some members of the prospective jury and was related to one of them. Those statements did not even amount to an invitation to engage in unlawful conduct, much less

to entrapment as a matter of law. What happened *after* petitioner's initial unlawful suggestion cannot establish the defense of entrapment; Vick's activities at that stage merely afforded petitioner the opportunity to continue on his course of criminal conduct under circumstances susceptible of proof.

III

Petitioner's present objections to the instructions on entrapment were not made at trial and clearly do not amount to "plain error" within the meaning of Rule 52(b), F.R. Crim. P. At all events, the jury was entitled to consider the evidence pertaining to the second count even if it acquitted petitioner on that count. Petitioner's own version of what happened with respect to that charge had substantial probative value on the question of his disposition to commit the offense alleged in the first count, and his disposition became a legitimate issue by reason of his entrapment defense. Nor was the concluding paragraph of the entrapment instruction rendered incorrect by the judges' use of the word "evidence"; the jury well understood, in the context of the whole instruction, what the intended meaning was.

The government's rebuttal evidence on the entrapment issue was proper. It was appropriate to show the jury how government agents had conducted themselves during the period when evidence was being collected. Vick's affidavit and the judges' testimony also corroborated Vick's version of the facts (which was critical to a determination of the entrapment issue) because it showed what evidence the gov-

ernment had on November 8. Since petitioner asserted that Vick had begun requesting him to authorize an approach on October 28 and many conversations had taken place between that date and November 7, the contents of the affidavit and the testimony of the judges—which shed light on what was known on November 8—were relevant in resolving this issue of credibility. And, in any event, petitioner did not object at trial on the ground which he is now asserting.

IV

Petitioner's claim that he committed no violation of the obstruction-of-justice statute because Vick had no intention of speaking to his cousin is based on a fundamental misapprehension regarding the law of attempt. The overwhelming weight of authority supports the proposition that petitioner's misconception regarding Vick's state of mind does not exonerate him on a charge of attempt. The few cases on which petitioner relies have been severely disapproved, represent a distinct minority view and are, in any event, distinguishable.

Moreover, the law of attempt is inapplicable here. This Court observed in *United States* v. *Russell*, 255 U.S. 138, that by using the word "endeavor" in 18 U.S.C. 1503, Congress intended to do away with the technical rules governing attempts and to reach every effort to achieve the unlawful purpose. Petitioner here plainly had the intention of achieving the purpose prohibited by the obstruction-of-justice statute, and he sought to enlist Vick in furtherance of that

aim. Such conduct was precisely what 18 U.S.C. 1503 was intended to prohibit.

ARGUMENT

I

THE TAPE RECORDING WAS PROPERLY ADMITTED IN EVIDENCE

Petitioner's initial challenge (Pet. Br. 26–36) is to the admissibility of the tape recording of his November 11 conversation with Vick. Implicit in petitioner's contentions is the premise that there was some impropriety by government officials in directing that the recording be made. For the reasons stated below, we think it entirely clear that there is no legal merit to either of petitioner's two arguments. But before dealing with them in light of precedent and particularized constitutional analysis, we emphasize briefly the practical situation confronting law enforcement officials on November 8, 1963—when it was decided to seek judicial authorization for Vick to record his next conversation with petitioner.

On that date Robert Vick, a Nashville police official and part-time private investigator, submitted a sworn affidavit in which he alleged that petitioner, an attorney of established reputation, was engaged in an effort to bribe a juror in a case—itself involving obstruction of justice—set for trial in the district. Unless they were prepared to ignore the statement as totally unworthy of belief, government officials were obliged to conduct further investigations. Whatever doubts may have been entertained as to the reliability of the information, it could obviously not be rejected out-of-hand.

Since a grand jury had already found probable cause to believe that efforts had been made corruptly to obstruct justice in an earlier trial in which petitioner was counsel for the defendant, it was not beyond credulity that similar efforts were being planned for the prospective trial, or even that an attorney of petitioner's reputation might be corrupted into participating or encouraging such attempts. It was vital to determine the truth not merely to punish petitioner if he was guilty or to preserve his reputation if he was innocent; the integrity of the administration of justice in the federal court in Nashville was at stake.

Investigative avenues were obviously limited. According to Vick's affidavit, petitioner had discussed the matter with him alone, and no one else had been privy to the secret they shared. It was plain that the truth could emerge only if the government had unimpeachable proof of the content of further conversations between petitioner and Vick. Any other effort to determine the facts would necessarily be beset by irreconcilable conflicts in testimony between the attorney of impeccable reputation and the less credible policeman and part-time investigator. And while the government might have been reluctant to [redacted] intrude itself upon a private conversation between the two parties against the wishes of both, Vick was perfectly willing to carry on his person a device which would record the conversation and thereby allow government agents to determine the truth of his story. It was in these circumstances that government counsel, who personally disbelieved Vick's report (R. 658a), sought permission from the district judges to attach a device to

Vick's person and to record the next meeting between petitioner and Vick. To secure the recording against forgeries and alterations, the device was attached under the supervision of F.B.I. agents who took possession of the tape immediately after Vick's meeting with petitioner.

Although we confine our arguments below to establishing that this course did not violate any of petitioner's constitutional rights, we are not content to rest on that conclusion alone. We believe that in the circumstances of this case the decision to seek judicial authorization and thereafter to have Vick record his conversations with petitioner was sound and proper, and does not, in any respect, warrant censure or disapproval. This Court's observation in *United States* v. *Ventresca,* 380 U.S. 102, 111–112, applies fully here:

> * * * This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires. * * * It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community.

281-261—66——3

A. THE RECORDING DID NOT VIOLATE PETITIONER'S FOURTH OR FIFTH AMENDMENT RIGHTS

Petitioner's Fourth and Fifth Amendment challenges to the lawfulness of the recording are squarely controlled, we submit, by *Lopez* v. *United States*, 373 U.S. 427. This case, like *Lopez*, concerns use of an electronic device not to eavesdrop on a conversation between parties who believed their communications were private but to make an accurate record, at the instance of one of the parties, of a conversation which that party was free to reveal and about which he ultimately testified. Accordingly, petitioner's request that this Court reconsider *Olmstead* v. *United States*, 277 U.S. 455, and *Goldman* v. *United States*, 316 U.S. 129 (Pet. Br. 20, 27–28), which involved third-party intrusions on conversations which the participants believed to be private, is inappropriate here.

Petitioner does not challenge the admissibility of Vick's testimony; he concedes that "[p]etitioner may have assumed the risk that his conversations with Vick would be divulged * * *" (Pet. Br. 30). We submit that if Vick's direct testimony was admissible, the objection to the recorded version of the selfsame conversations must fall. Petitioner's claim was analyzed by this Court in *Lopez* (373 U.S. at 439):

> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborative evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation

that the agent could testify to from memory. * * *

1. Vick's presence did not violate any right of privacy

Petitioner does not directly attack the admissibility of Vick's testimony on Fourth Amendment grounds. Since a related question is raised, however, in *Lewis* v. *United States,* No. 36, this Term, and in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, we believe it appropriate to discuss the issue briefly insofar as it affects this case.

For the reasons stated in greater detail in our brief in *Lewis,* we believe that the Fourth Amendment is not violated when a person acting in an undercover governmental capacity converses or has face-to-face dealings with an individual who is engaged or is planning to engage in criminal conduct. As we demonstrate in our brief in *Lewis,* this Court has repeatedly recognized that certain stratagems are necessary for the detection, apprehension and conviction of those who violate the criminal law. Pretending that one is a confederate in crime is a reasonable and inoffensive technique which law enforcement officials have always been permitted to use in gathering information and evidence. A civilized society may fairly impose on its members the risk that those with whom they deal may not be as faithful as they seem. Betrayal by a pretended friend is, as Mr. Justice Brennan observed in his dissenting opinion in *Lopez* v. *United States,* 373 U.S. 427, 465, a risk which "is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak."

When petitioner confided in Vick on November 11, he trusted Vick not to disclose the contents of their conversation. The fact that his trust was misplaced does not entitle him to bar Vick's testimony. That was settled conclusively in *Lopez* and was, apparently, a proposition on which the entire Court agreed. See 373 U.S. at 438, 442, 450, 465. Petitioner attempts to distinguish *Lopez* on the ground that the witness in that case was known to be a federal agent whereas in the present case petitioner did not know that Vick was reporting to the government (Pet. Br. 28). The distinction is unsound, however, because the essential nature of the deception was the same in both cases—the witness represented that he was prepared to join in the unlawful venture. Consequently, even though the witness in *Lopez* was initially known to be a federal agent, his representations—like those of Vick—induced the defendant to believe that his statements would not be disclosed.

Nor does the fact that they spoke in petitioner's office cloak the conversation between petitioner and Vick with any form of privilege. As we demonstrate in our brief in *Lewis*, in circumstances such as these the site of the conversation is legally irrelevant because the speaker is not relying on the privacy of the locale to silence the auditor; he commits his secret to his listener, wherever they may be conversing, with full knowledge that the latter is free to repeat what he has heard. Indeed, in this case petitioner and Vick left petitioner's office and went "outside" on the prior occasions—November 7 and 8—when they

wished to discuss the juror approach in greatest privacy (R. 201a, 203a).

Consequently, the fact that Vick came to petitioner's office on November 11 and there represented that he was interested in furthering petitioner's illegal scheme does not taint his testimony concerning petitioner's statements to him. For, as was true of the agent in *Lopez*, "[h]e was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge." 373 U.S. at 438. There was, in short, no probing of the secrets of the room. Petitioner is complaining not because something secreted in his private office was brought to light but simply because Vick repeated statements which could have been made to him anywhere but happened to be made in petitioner's office.

Nor, in these circumstances, can it be argued that petitioner's secret thoughts were unfairly extracted from him by means of Vick's subterfuge. Vick's testimony (and the corroborative recording) dealt not with admissions concerning some past offense but with communications which were, in and of themselves, the very essence of the offense charged in the indictment. The endeavor to obstruct justice could be executed by petitioner only by communicating with Vick as he did. Hence it cannot be claimed that Vick's conduct violated the Fifth Amendment by "secretly tak[ing]" from petitioner disclosures which

would not otherwise have been made (Pet. Br. 27–28).[5]

2. The presence of the recording device did not violate any right of privacy

Here, as in *Lopez,* the claim regarding the admissibility of Vick's recording "emerges in proper perspective" (373 U.S. at 438) once it is shown that there was no infirmity whatever in Vick's testimony. For, as in *Lopez,* the recording was merely "the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." 373 U.S. at 439. The device was carried into the room

[5] The *amicus* brief of the American Civil Liberties Union argues that the Fourth Amendment was violated here because the government did not, prior to Vick's first meeting with petitioner, present evidence to a judicial officer demonstrating probable cause to believe that petitioner would commit an offense. In effect, the *amicus* argues that the equivalent of a warrant is constitutionally required before the government may employ the services of an informant. The rule is obviously not required by the language of the Fourth Amendment, however, and it finds no precedent in the history of its administration. Its wisdom is, we submit, properly a matter for legislative consideration, not for judicial decision. And it is surely inappropriate to apply such a novel rule—which government counsel could not have anticipated—retroactively to invalidate a conviction. Moreover, whatever the merits of the suggestion—and we submit that it rests on unrealistic premises regarding law enforcement and the use of informants and on unsound assertions regarding the Fourth Amendment—it is plainly insubstantial as applied to the facts of this case. Here the government had previously been told by Vick that he and another investigator had been used by petitioner as intermediaries in an earlier attempt to approach a juror. If probable cause be required, Vick's earlier reports met that standard.

by Vick and it did no more than to record mechanically what Vick said and heard. Consequently, it intruded on the privacy of petitioner's office to no greater extent than did Vick himself; and, as we have shown, Vick's presence infringed upon no constitutional protection.

Petitioner urges that the *Lopez* decision be reconsidered insofar as it held that the presence of the recording device in the defendant's office was not a violation of the Fourth Amendment (Pet. Br. 20, 29–30). We submit, of course, that *Lopez* was correctly decided, but we maintain, in addition, that the circumstances of this case satisfy the standards announced by the concurring and dissenting opinions in *Lopez.*

First, we note that the elements which, in the view of the Chief Justice, distinguished *Lopez* from *On Lee* v. *United States,* 343 U.S. 747, are present here as well. The recording in the present case was not used "to obviate the need to put [Vick] on the stand" (373 U.S. at 443) as was true in *On Lee;* it was used to corroborate the testimony of the person whom the defendant invited to enter his premises and to whom he spoke, as in *Lopez.* In addition, the recording was not used for at-large investigation. The recording in *Lopez* had the justifiable public purpose of "protect[ing] the credibility" of Internal Revenue agents against "outright denials or claims of entrapment * * * which, if not open to conclusive refutation, will undermine the reputation of the individual agent for honesty and the public's confidence in his work." 373 U.S. at 442. The recording here was needed, as

well, to support the credibility of Vick against similar denials and claims. Like the agent in *Lopez*, Vick was faced with the situation where "proof of an attempted bribe [was] a matter of [his] word against that of [petitioner] * * *." *Ibid.* It was fair here, as it was in *Lopez*, for the witness to "support his credibility with a recording." *Ibid.*

Second, the serious dangers of electronic eavesdropping which the *Lopez* dissenters described are a far cry from the facts of this case: This is not a case of "pervasive" eavesdropping by outlandish devices (373 U.S. at 467–468); an ordinary small tape recorder was used to provide a permanent record of a single conversation. There is no suggestion that "faking" of any kind was involved (373 U.S. at 468); the tape was concededly accurate (p. 12, *supra*). There is no basis for believing that any State regulatory scheme was violated (373 U.S. at 468–469). The legitimate need for the recording to determine whether there was any basis for Vick's allegation can hardly be gainsaid (see pp. 25–27, *supra*; 373 U.S. at 469). The recording cannot be deemed "indiscriminate" surveillance (373 U.S. at 463); it was limited to a single conversation on a single subject. Nor can it be characterized as "an electronic seizure * * * [of] mere evidence" (373 U.S. at 463); the statements made by petitioner were as much "instrumentalities of crime" as words can ever be: they constituted the very nub of the offense.

Third, if any procedure could ever be the equivalent of obtaining a warrant for an electronic search—which the dissenters believed essential in *Lopez* (373

U.S. at 463–465)—it was the procedure followed by government counsel in this case. Having received evidence from a reliable source[*] that bribery of a juror was being planned, government counsel submitted the affidavit of the informant to two federal district judges and sought permission to have a particular conversation recorded under very scrupulous safeguards. The judges read the affidavit and authorized the recording. This, we submit, surely satisfied "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment * * *." *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 272. The fact that no formal warrant issued is attributable, we submit, to the novelty of the procedure—which was unique in its protection of petitioner's rights—and should not invalidate the subsequent "seizure" of petitioner's statements.

Petitioner's real objection to the recording is that it rendered perjury futile. In speaking privately with Vick, petitioner supposed that he was assuming little risk. As he told Vick (p. 11, *supra*): "We'll keep it secret. The way to keep it safe is that nobody knows about it but you and me—where could they ever go?" Petitioner was apparently planning to deny having made such statements if Vick should ever disclose that he did so. Indeed, outright denial was

[*] It should be remembered that Vick supplied information in July or August dealing with the contemplated approach to juror Harrison (pp. 18, 20–21, *supra*). Investigation of that information apparently produced the testimony of Beard, who was a government witness in this case (R. 11b–19b). It is fair to say, therefore, that Vick had provided reliable information.

his immediate response to questioning by the judges (p. 13, *supra*). His expectation was that the matter would then become, as petitioner's brief characterizes it now, a test of veracity between "an untrustworthy informer and a reputable professional man" (Pet. Br. 24)—a swearing contest in which the participants would be "a professional man of reputation, and * * * an untrustworthy and essentially slimy character" (Pet. Br. 48). This apparent plan emphasizes the importance of permitting, in appropriate circumstances, the evidence provided by recordings. We believe, as the Chief Justice suggested in the *Lopez* case (373 U.S. at 442), that there is an important public policy supporting the use of recording devices to protect persons in Vick's position against unwarranted attacks on their credibility.

B. THE JUDGES' AUTHORIZATION OF THE RECORDING WAS PROPER

Petitioner's second challenge to the admissibility of the recording is based on the rather unusual premise that it was improper for government counsel to seek and obtain judicial authorization before permitting Vick to record his conversations with petitioner. In making this argument, petitioner mistakes a virtue for a vice.

As we have shown, and as the court of appeals apparently concluded (R. 56, n. 1), the presentation of Vick's affidavit to the judges and the request for authorization to engage in limited recording was analogous to the procedures followed in obtaining a search warrant. Hence the judges' participation here—like prior judicial authorization of a search or

an arrest (cf, *United States* v. *Ventresca,* 380 U.S. 102; *Aguilar* v. *Texas,* 378 U.S. 108, 110–111; *Jones* v. *United States,* 362 U.S. 257, 270–271; *Johnson* v. *United States,* 333 U.S. 10, 14)—is to be favored rather than disapproved. It would be anomalous, indeed, if under a system of law which prefers "the informed and deliberate determinations of magistrates empowered to issue warrants * * * over the hurried action of officers * * * who may happen to make arrests" (*United States* v. *Lefkowitz,* 285 U.S. 452, 464), the recording in this case were held improper because that "informed and deliberate determination" was sought before the action was taken.

Petitioner's contention that the judges "stepped down into the arena to track down suspected offenders * * *" (Pet. Br. 35) is patently unsound. The judges here did no more in authorizing the recording than any magistrate does in approving an application for a search warrant. The warrant, like the authorization in this case, may produce evidence which is usable at a trial. But both the search and the recording serve legitimate purposes other than the collection of evidence. In the case of the warrant instrumentalities and fruits of crime or contraband are seized; the recording here "seized," as it were, the statements which were the instrumentalities of the offense and established whether or not an offense was in fact being committed.

Petitioner's assertion that it was improper to play the recording for the judges after it was made (Pet. Br. 32–33) is both irrelevant and unsound. It is irrelevant because what was done with the recording

after it was made does not affect its admissibility in evidence. Even if it were improper to have played the recording for the judges, that would not retroactively change the circumstances under which the recording was made. And only those circumstances determine its admissibility. *United States* v. *Mitchell*, 322 U.S. 65, 70–71.

The assertion is also unsound because, on the facts of this case, the judges had a unique function to perform. They had been shown an affidavit making serious allegations, affecting the integrity of the administration of justice, against an officer of the court, who was representing a defendant in a prospective trial. It was, therefore, their duty to seek out the truth and, if necessary, to discipline counsel. See *Ex parte Burr*, 9 Wheat. 529, 531; *Ex parte Secombe*, 19 How. 9, 13; *Ex parte Wall*, 107 U.S. 265, 273, 288–289. The results of their investigation may have contributed to petitioner's conviction of a criminal offense, but that did not disable the judges from conducting an inquiry to determine whether petitioner should be disbarred. The hearings before the district judges (pp. 13–17, *supra*) were, in fact, part of a disbarment proceeding which is now pending in the court of appeals. The judges were obliged to conduct that proceeding in order to protect the court as an instrument of justice. See *In re Isserman*, 345 U.S. 286, 289; see also *Theard* v. *United States*, 354 U.S. 278, 281; *Bradley* v. *Fisher*, 13 Wall. 335; *Ex parte Robinson*, 19 Wall. 505, 512; *Ex parte Bradley*, 7 Wall. 364, 374; *Randall* v. *Brigham*, 7 Wall. 523, 540. In relation to that proceeding they properly heard the tape record-

ing of the conversation between Vick and petitioner. We note again that both judges disqualified themselves from trying the charges against petitioner, and that a district judge from the Western District of Tennessee was specially designated for this trial (R. 154a). What Judges Miller and Gray did in November 1963 was entirely proper and necessary in the circumstances to preserve the integrity of the district court.

II

ENTRAPMENT WAS NOT ESTABLISHED AS A MATTER OF LAW

Petitioner's claim that the entrapment issue should not have gone to the jury because entrapment was established as a matter of law (Pet. Br. 36–41) is refuted by Vick's version of the conversation of November 7, when the plan to approach the prospective juror was hatched. Vick testified as follows (R. 200a–201a):

> Well, we were in Mr. Osborn's office discussing the prospective jurors that I was investigating, that is, in Judge Miller's Court, and I mentioned that I knew some members in Judge Gray's court, and Mr. Osborn jumped up and said, "You do?"
>
> And said, "Why didn't you tell me?"
>
> And I said that I had previously told John Polk [another investigator] that I was acquainted with some of the jurors in Judge Gray's Court. Then we discussed about whether to discuss it in his office or not, and we went outside and discussed it, and he said—I told him the juror Elliott was a cousin of mine, and that—and he told me to go down to

> Springfield and get him on his—our side, and talk to him, and see what, if any, arrangements could be made, or something like that, about the case, this, that and the other.

This testimony was consistent with what Vick had testified to on the motion to suppress [7] and with the

---

[7] Vick gave the following testimony during the hearing on that motion (R. 21b–22b):

"Q. Now, in this conversation on November 7—prior to this conversation of November 7, did you ever make any suggestion to Mr. Osborn in any shape, form or fashion that you contact a juror?

"A. No, sir.

"Q. None whatever?

"A. No, sir.

"Q. All right. In this conversation did you tell Mr. Osborn that you had a cousin on the prospective Hoffa jury panel?

"A. Yes, sir, I did.

"Q. Did you tell him his name?

"A. Yes, sir.

"Q. His name was Mr. Ralph A. Elliott?

"A. Yes, correct.

"Q. At this time did he ask you to go talk to Elliott to get him on your side?

"A. Yes, sir.

"Q. He wanted him on the jury?

"A. Yes, sir, he did.

"Q. To sit down with him and talk to him or get him on the jury—or go contact him right away, sit down, talk to him, get him on our side, we want him on the jury?

"A. Yes, sir, that is correct.

"Q. Was that the subject of the conversation?

"A. Yes, sir.

"Q. You did not initiate that conversation whatsoever?

"A. No, sir."

In response to defense questioning Vick testified (R. 131a–132a, 139a–140a):

"Q. Then, as I understand you, the first conversation you ever had about the Juror Elliott with Mr. Osborn was occasioned by Mr. Osborn, you had not discussed him with anybody connected with the Government?

contents of the affidavit he submitted on November 8.[8] Vick's story, in substance, was that he had said nothing more to petitioner to suggest an improper

---

"A. I don't think I had, Mr. Norman.

"Q. All right. Did you devise a plan to pretend to Mr. Osborn that you were going to talk to the Juror Elliott.

"A. I did not devise any plan at all, Mr. Norman.

"Q. Well, you propositioned him about talking to Elliott, didn't you?

"A. No, sir, I did not.

"Q. You mean he propositioned you about it?

"A. Yes, sir."

* * * * *

"Q. All right, sir. When you went to Mr. Osborn's office, did you intend to pretend you wanted to talk to the Juror Elliott, whether Osborn employed you or not?

"A. No, sir.

"Q. Only on—if he employed you, is that right?

"A. I didn't pretend at that time to talk about any juror, Mr. Norman.

"Q. Well——

"A. Other than the ones he had hired me to investigate."

* * * * *

"Q. I will ask you if it was not your whole purpose in coming to Mr. Osborn's office to persuade him to agree to a deal you would pretend you would go to the juror Elliott?"

* * * * *

"Q. From the time you talked with Mr. Sheridan, I mean, after—the whole thing—all of them—wasn't it in order to persuade Mr. Osborn to join in the pretense that you had about seeing Elliott?

"A. I never tried to persuade Mr. Osborn in anything, Mr. Norman.

"Q. Well, why did you tell him then, that you had already been to see Elliott?

"A. He had asked me to go see him."

[8] The relevant portion of the affidavit read as follows (R. 654a-655a):

"On November 7, 1963, I was in Mr. Osborn's office going over the results of my investigation. I was aware that the

approach than that he knew three people on the jury panel and that one of them was a cousin.

Petitioner's verson differed in various respects. He testified that immediately upon being given a list of jurors to investigate on October 28, Vick had said, "Tommy, I have a cousin on Judge Gray's jury." After petitioner responded that he hadn't known that fact, Vick said—according to petitioner's testimony—"This cousin and I are close. I could talk with him if you wanted me to." Petitioner testified that he responded, "Now, Bob, you have been in trouble enough. I don't want you to do that. You stick to these 75 names and let that be the end of it" (R. 459a–460a). According to petitioner, Vick returned several

---

jury panel which I had been investigating was the panel assigned to Judge William E. Miller. Mr. Osborn and I got into a discussion of the jury panel assigned to Judge Frank Gray, Jr. This jury panel list had previously been shown to me by John Polk, an investigator for Mr. Osborn. Polk told me at that time that he was investigating the jury panel assigned to Judge Gray. At that time, I mentioned to Polk that I knew three of the people on the jury panel. In discussing the panel with Mr. Osborn, I again mentioned that I knew three of the people on the jury panel. Mr. Osborn said, 'You do? Why didn't you tell me?' I told Mr. Osborn I had told John Polk and assumed that John Polk had told him. Mr. Osborn said that Polk had not told him and suggested that we discuss the matter further. We then left Mr. Osborn's office and walked out onto the street to discuss the matter further. Mr. Osborn asked me how well I knew the three prospective jurors. I told him that I knew Mr. Ralph A. Elliott, Springfield, Tennessee, the best since he was my cousin. Mr. Osborn asked me whether I knew him well enough to talk to him about anything. I said that I thought I did. Mr. Osborn then said, 'Go contact him right away. Sit down and talk to him and get him on our side. We want him on the jury.' I told Mr. Osborn that I thought Mr. Elliott was not in very good financial position and Mr. Osborn said, 'Good, go see him right away'."

days later with the same suggestion. Petitioner first told him not to talk to his cousin, but later said that if he really ran into him "by accident," it would be all right (R. 462a–463a).

The jury was, of course, entitled to believe Vick's testimony. *Masciale* v. *United States*, 356 U.S. 386. It could, therefore, conclude that upon hearing nothing more than that Vick knew several people on the jury panel petitioner had "jumped up" and gone outside with Vick to explore the possibilities of a corrupt approach to a juror. The jury was also entitled to conclude that petitioner needed no more encouragement to suggest that Vick speak to the prospective juror and make arrangements to "get him on our side" than the knowledge (which he gained while they were "outside") that the juror was a cousin of Vick.

Thus reduced to its essentials, petitioner's claim is that the mere statement, "I know some members of the jury" and the elaboration, "One of the jurors is a cousin of mine" are such glittering temptations to an attorney that he should not be expected to resist the opportunity to obstruct justice by offering a bribe. Obviously, that cannot be the rule. Vick's statements regarding his acquaintance and family relationship with jury members can hardly be considered a "trap for the unwary innocent" (*Sherman* v. *United States*, 356 U.S. 369, 372), which is the earmark of genuine entrapment. Only an individual who is searching for a juror to bribe would treat these statements as a solicitation. This case is a far cry from *Sherman* v. *United States*, 356 U.S. 369, where the undisputed testimony showed that the resistance of an unwilling

231-261—66——4

former narcotics addict had been overborne by repeated requests and appeals for sympathy by a government informant. In this case no resistance whatever was offered by petitioner, nor was any request or solicitation made by Vick. Vick's statements merely provided an opportunity, and that opportunity was father to the act.

The fact that Vick opened the discussion concerning Elliott by making the truthful statement that Elliott was his cousin (R. 201a, 20b), does not mean that all subsequent conversation regarding that subject was the result of entrapment. Jury bribers do not ordinarily advertise in newspapers; they make their offers through intermediaries who are usually acquainted with the jurors to be bribed. By disclosing his relationship Vick merely set the stage; petitioner lost no time in ringing up the curtain and taking the leading role.

Petitioner contends that his offense was the product of Vick's "creative" activity (*Sherman* v. *United States,* 356 U.S. 369, 372) because Vick returned to him on two occasions after November 7 and falsely represented that he had spoken with Elliott, thereby inducing petitioner to make additional statements in furtherance of his unlawful scheme (Pet. Br. 37–41). This contention overlooks the fact that the offense was begun on November 7, and that consequently the critical issue is what led to petitioner's initial suggestion on that date. What Vick did after November 7 was exactly what the Internal Revenue agent did in *Lopez* v. *United States,* 373 U.S. 427, 436, *i.e.,* "afford an opportunity for the continuation of a course of crimi-

nal conduct, upon which the petitioner had earlier voluntarily embarked, under circumstances susceptible of proof."

Moreover, petitioner's own testimony, if believed, would not warrant the conclusion that he was entrapped as a matter of law. He conceded that he struggled against the temptation "feebly" or "sickly" (R. 397a, 487a). According to his own story, his only objection to Vick's initial proposal was that Vick had "been in trouble enough" (R. 460a). And petitioner's testimony had him instructing Vick on the subtleties of jury bribery—including the far-from-obvious observation that "any sensible jury briber would be paying half down and half later" (R. 464a).

At all events, the most convincing refutation of petitioner's entrapment claim is the admittedly accurate recording of the conversation of November 11 (pp. 5–12, *supra*). The jury could fairly conclude that it was improbable that the individual who on November 11 (1) began the discussion of bribery by asking, "Did you talk to him?", (2) instructed Vick, "Tell him it's a deal," (3) said, "I think everything looks perfect," (4) imposed the condition that Elliott be "accepted on the jury," (5) demanded that Elliott hang the jury "All the way, now," (6) reassured Vick that another investigator "does not know one thing," and (7) directed Vick how and when he should speak to Elliott again, was, just four days earlier, an innocent person whom Vick lured into an unlawful scheme. And the most persuasive portion of the recorded conversation was petitioner's instruction to Vick to tell

Elliott that "there will be at least two others with him" (p. 11, *supra*). As the court of appeals observed (R. 61), that statement was plainly inconsistent with petitioner's claim that he was a reluctant participant in a scheme which he did not devise. The preceding colloquy indicates that Vick looked to petitioner for guidance, and that petitioner represented that he knew how many of the prospective jurors were to be improperly influenced by the time of the jury's deliberations. And the inferences which may fairly be drawn from the recording are buttressed by the inherent improbability that a layman such as Vick overpowered the law-abiding instincts of petitioner, an attorney of more than 20 years' experience (R. 437a-439a), and beguiled petitioner into participating in a patently unlawful venture.

Finally, there is no merit to petitioner's suggestion that if the views of the separate opinions in *Sorrells* v. *United States*, 287 U.S. 435, 453, and in *Sherman* v. *United States*, 356 U.S. 369, 378, were applied to the facts of this case, reversal would be required (Pet. Br. 41). For the government's conduct in this instance did not amount to "lawless means or means that violate rationally vindicated standards of justice." 356 U.S. at 380. The record shows that on November 7, when the illegal scheme was first broached, Vick was acting in the capacity of a private citizen who had been retained by petitioner to investigate jurors.[9] He had, it is true, agreed to inform

[9] Vick responded correctly on cross-examination that he did not "become a government agent" as a result of his conversations with Sheridan in the summer of 1963 (R. 142a; 226a). It

Sheridan if he learned of any illegal activity, but that agreement was no more than a formal expression of a duty which every citizen owes to organized society. See 18 U.S.C. 4.

In his dealings with petitioner up to and including the crucial date of November 7, Vick had engaged in no material deception. He did not conceal his identity or otherwise practice stealth or misrepresentation. He was doing what petitioner had hired him to do, and the unlawful suggestion was prompted by a truthful observation regarding a prospective juror. The only material disclosure Vick failed to make was that he had agreed to report unlawful activities to the government. That disclosure, we submit, was not required by any constitutional provision or by any principle of the law of entrapment. See *Lopez* v.

---

was entirely proper for Sheridan to see Vick at that time since evidence of obstruction-of-justice in the 1962 Nashville trial had then been submitted to a grand jury and was found sufficient to warrant the return of an indictment. It was not unlikely that Vick, who had worked for petitioner as an investigator, had information concerning the endeavors involved in the indictment or others. In fact, Vick did then supply information concerning an endeavor which was not included in the indictment—*i.e.*, the Beard-Harrison approach (pp. 18, 20–21, *supra*).

Having received this information from Vick, Sheridan properly asked if he would transmit information dealing with future illegal activities. Indeed, apart from Sheridan's request, Vick was under a statutory obligation (18 U.S.C. 4) to report known felonies which, with respect to future crimes, would have overriden even the attorney-client privilege. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15; *In re Sawyer's Petition*, 229 F. 2d 805, 808–809 (C.A. 7), certiorari denied, 351 U.S. 966. Sheridan carefully and repeatedly cautioned that he was interested only in evidence of unlawful conduct.

United States, 373 U.S. 427; *Sherman* v. *United States,* 356 U.S. at 372; *Masciale* v. *United States,* 356 U.S. at 387; *Whiting* v. *United States,* 321 F. 2d 72 (C.A. 1); *United States* v. *Horton,* 328 F. 2d 132 (C.A. 3), certiorari denied *sub nom. Edgar* v. *United States,* 377 U.S. 970; *United States* v. *Bush,* 283 F. 2d 51 (C.A. 6), certiorari denied, 364 U.S. 942; *United States* v. *Denton,* 307 F. 2d 336 (C.A. 6), certiorari denied, 371 U.S. 923. See also our brief in *Lewis* v. *United States,* No. 36, this Term.[10]

Indeed, there can hardly be any doubt that even under the standard established in the Model Penal Code,[11] which broadens the scope of entrapment beyond this Court's decisions, Vick's conduct would not be impermissible. For Vick employed no "methods of persuasion or inducement" nor did he conduct himself in any way that could encourage the commission

[10] The law review comment on which petitioner relies (74 Yale L.J. 942) is concerned with solicitations by government agents which induce others to commit offenses.

[11] Section 2.13 of the ALI, Model Penal Code, reads as follows:

"(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."

* * * * *

of the offense by anyone "other than those who are ready to commit it."

III

THE INSTRUCTIONS ON ENTRAPMENT AND THE REBUTTAL EVIDENCE ADMITTED ON THAT ISSUE WERE PROPER

The entrapment defense was, as we have shown, not established as a matter of law. It was, however, submitted for the jury's consideration under proper instructions (R. 697a–698a)—to which the defense made no objection after the instructions were completed (R. 708a).[12] Petitioner now urges, however, that the instructions were improper in two respects and that certain evidence was incorrectly admitted to rebut the defense of entrapment (Pet. Br. 41–50). There is no merit to any of these contentions.

A. THE COURT PROPERLY REFUSED TO INSTRUCT THAT THE EVIDENCE AS TO EACH COUNT WAS TO BE CONSIDERED SEPARATELY

At the conclusion of the evidence, petitioner requested an instruction to the jury not to consider as to one count the evidence offered with relation to any other count (R. 711a). The court's refusal of that instruction was, we submit, perfectly correct because, as this Court noted in *Sorrells* v. *United States*, 287 U.S. 435, 451, an accused who relies on a defense of entrapment "cannot complain of an appropriate and

---

[12] Petitioner suggests in passing that the entrapment issue might better have been determined by the court than the jury (Pet. Br. 43). That contention was not presented in the court of appeals or in the petition for certiorari. Indeed, petitioner's trial counsel expressly conceded that it was an issue for the jury (R. 651a).

searching inquiry into his own conduct and predisposition as bearing upon that issue." The evidence presented with respect to the second count of the indictment (pp. 20–21, *supra*) would have been relevant and admissible proof bearing on petitioner's predisposition even if he had been tried on the first count alone. Testimony that he sought to communicate with a juror in an earlier case could properly have been considered by the jury in determining whether he had been entrapped by Vick. Consequently, the district judge was right in refusing to give an instruction which would have prohibited the jury from considering that proof in deciding guilt or innocence on the first count.

Petitioner now contends that it was error for the judge not to instruct the jury that if it acquitted petitioner on the second count, it should not consider that evidence with respect to the first count (Pet. Br. 41–43). The short answer to that contention is that no such instruction was ever requested. Rule 30, F.R. Crim. P. The far broader instruction which was proposed would have required the jury to disregard, for purposes of the first count, the evidence pertaining to the second count even if it found petitioner guilty on the second. For the reasons stated above, that instruction was plainly erroneous and was properly denied.

Moreover, the jury's acquittal of petitioner on the second count did not render irrelevant all evidence pertaining thereto. The jury may well have acquitted on the second count because it believed petitioner's version of the events rather than Beard's.

But even petitioner's account had substantial probative value in establishing his disposition to commit the offense alleged in the first count. For, according to petitioner's version, his objection to Beard's proposal was not that it was unlawful or unethical, but that it could not be accomplished because of the jury's sequestration (p. 21, *supra*). Moreover, petitioner testified that he spoke with Beard because he was interested in developing the "potential for leadership" of juror Harrison, who "was probably pro-defense" (R. 490a–491a). The jury could fairly draw its own inferences, in light of petitioner's failure to explain further how he intended to develop this "potential" and why he was interested in the reported alcoholism of the juror's husband (R. 493a–494a), as to what petitioner's real purpose was. Hence even if it accepted petitioner's testimony that it was Beard, and not petitioner, who suggested that the juror be bribed, the jury could consider petitioner's responses and his motive in talking to Beard in determining whether there was substance to the claim that he was later entrapped by Vick.

B. THE ENTRAPMENT INSTRUCTION WAS CORRECT

Petitioner challenges the entrapment instruction because of its concluding paragraph which reads (R. 698a):

> If on the other hand, you find on the facts and circumstances of this case and on the instructions as here given you by the Court that the evidence aforesaid, including the tape recording, was obtained by lawful means, that is,

> that there was no unlawful entrapment, you will find this particular issue against the defendant and your verdict on Count One would be for the Government.

Petitioner's contention turns on the court's use of the word "evidence," the argument being that this improperly left to the jury the question whether or not the tape recording was admissible (Pet. Br. 44-45). This grossly distorts the instruction which, when read in its entirety, leaves to the jury only the question whether petitioner's conduct was the product of impermissible police activity designed to trap an otherwise innocent person. In concluding that entrapment instruction the court directed the jury that if it had a reasonable doubt whether "the evidence" was obtained by means of entrapment, it should acquit petitioner; if, on the other hand, it found that "the evidence * * * including the tape recording" was obtained by lawful methods, it should find petitioner guilty (R. 698a). It was entirely clear to the jury, we submit, that the court was using the word "evidence" as a concise equivalent of "the proof that has been presented to you that the defendant engaged in unlawful conduct." This properly left to the jury the question on which it was supposed to pass—whether petitioner's statements to Vick, *including those on the recording,* were induced by impermissible conduct designed to trap the unwary innocent. If petitioner believed that the jury would be confused by this use of the word "evidence," it was his obligation to assert a timely objection. It is precisely to enable a district judge to correct such slight variations which are

allegedly misleading that Rule 30, F.R. Crim. P., requires that a timely objection be interposed. Petitioner here made no objection whatever. We submit that the instruction was properly understood by the jury and that it could not, in any event, be deemed "plain error" under Rule 52(b), F.R. Crim. P.

C. THE EVIDENCE INTRODUCED IN REBUTTAL TO PETITIONER'S ENTRAPMENT DEFENSE WAS PROPER

Testifying in his own defense, petitioner did not deny having spoken to Vick about bribing juror Elliott. His only defense was that Vick had "hooked" him (R. 486a) by repeated urgings prior to November 11 to participate in the unlawful scheme. The theory on which petitioner rested his defense was that Vick "had a firm arrangement with the government that he was to try to get employed by [petitioner] in order to get information" (R. 460a) and that, pursuant to this arrangement, he was so employed and was then directed to entrap petitioner "[t]o take [him] out of the lawsuit" (R. 467a).[13]

In support of his version of the facts, petitioner contradicted Vick's testimony in several important respects. He testified, *inter alia*, that Vick had first mentioned his relationship to juror Elliott on October

[13] Or, as petitioner's counsel put it during a colloquy with the court out of the presence of the jury (R. 555a): "The legal proposition is that the whole thing, from February on, when he started to reporting, that he became a government agent; that the idea of getting employed by Tommy Osborn originated in his mind, and the government agents' mind, and Mr. Sheridan's mind, and that there was a plan to get employed by Tommy Osborn so he could entrap him into a pretended offense, and that the whole thing constituted entrapment."

28, when he was given the jury list, and that on the same afternoon or the next day he returned to petitioner and again suggested that he could speak with prospective jurors (R. 460a–461a). It was at that meeting, according to petitioner's version, that he told Vick that if he really ran into Elliott "by accident," it would be all right to speak with him (R. 463a). Petitioner then testified that three or four days later, but still apparently some time before November 7, Vick returned and reported that he had spoken with his cousin and that Elliott had said that he would take a bribe. It was during this conversation, petitioner asserted, that he had said that "any sensible jury briber would be paying half down and half later" (R. 463a–464a). Petitioner identified a conversation described in Vick's affidavit as having occurred some time later (R. 465a).

It is quite obvious that in passing on petitioner's entrapment defense, the jury was required to evaluate the significance of the recording of November 11 in light of the conflicting testimony regarding Vick's prior course of conduct. It was highly relevant, in this regard, to determine whether Vick's testimony that discussion of juror Elliott began on November 7 was truthful or whether petitioner told the truth when he said that Vick had begun urging an approach to Elliott as early as October 28. Even more significant on this issue was the question of government participation. Petitioner's theory assumed that government agents—particularly Walter Sheridan—had encouraged Vick to seek employment from petitioner and had then stealthily guided Vick's alleged efforts at en-

trapment. The evidence introduced by the government on rebuttal responded to this theory and demonstrated that it was untenable. Since one factual issue bearing upon an entrapment defense is the nature of "the activities of [government] representatives in relation to the accused" (*Sorrells* v. *United States*, 287 U.S. 435, 451), the rebuttal evidence pertaining to the government's conduct was properly admitted.

1. *The judges' testimony.*—Judges Gray and Miller testified regarding the details of their November 8 authorization of the tape recording. Even though the fact that the judges had authorized the recording had previously been mentioned in the jury's presence,[14] the circumstances under which the authorization was given had never been the subject of direct testimony.

[14] Petitioner asserts that the reading to the jury of one of the disbarment hearings during which Judge Gray advised petitioner and his counsel that the recording had been authorized by Judge Miller and himself had put the authorization "in evidence for all purposes" (Pet. Br. 47). It is true that no limiting instruction was sought or given when the transcript of the hearing was read, but that did not, we submit, establish, under the hearsay rules, the fact of authorization. Petitioner's presence when Judge Gray made the statement may have rendered it admissible to establish that petitioner had been so advised; it is even arguable that his silence (notwithstanding the unusual circumstances) might permit an inference of acquiescence *to the extent that petitioner could have had any knowledge.* But obviously petitioner could not have known at that time whether or not the recording had been authorized. Hence it would surely have been improper, notwithstanding petitioner's failure to ask for a limiting instruction, for government counsel to have argued to the jury merely from the disbarment transcript that the recording had, in fact, been authorized. For this reason alone it was proper to put the judges on the stand in rebuttal to testify that they had authorized the recording of November 11.

It was relevant to the issue of entrapment for the jury to know what evidence the government claimed to have had in its possession on November 8, when it sought authorization for the recording. It was also relevant for the jury to know—as bearing on the government's conduct—that after the attempted recording of November 8 had failed, government counsel again sought judicial authorization from Judge Miller before recording a second time (R. 660a).

There is no substance whatever to the claim that the judges expressed their views that "petitioner had been proved guilty" (Pet. Br. 49). Their brief testimony (R. 651a–661a) contains no hint of any such finding; they limited their testimony strictly to the circumstances *preceding* the making of the recording. The only question pertaining to a time after the recording was made was when Judge Miller responded, "Yes, sir" to the question whether he had "subsequently heard the tape recording yourself" (R. 660a).

Finally, we note that petitioner did not object to the judges' testimony on the ground now urged. The only grounds for objection asserted at the trial were that the testimony was not proper rebuttal (R. 651a). And the motion to strike made after the judges had testified was based entirely on the ground that "it was testimony in possession, clearly in possession of the government which could have and should have been introduced in chief, and was in rebuttal of not one single thing the defendant put forth, whatsoever" (R. 661a). Petitioner never suggested his present understanding of the evidence in chief as having established "for all purposes" the fact that the record-

ing had been authorized. See Pet. Br. 47; note 14, *supra*. In these circumstances, it was proper for the district court to overrule petitioner's objections. The very broad discretion assigned to district judges to permit evidence in rebuttal which might have been presented during the case in chief is well established. See, *e.g.*, *Goldsby* v. *United States*, 160 U.S. 70.

2. *Vick's affidavit.*—The affidavit was admissible in rebuttal on similar grounds. In deciding whether Vick or petitioner was telling the truth as to when their conversations regarding juror Elliott began, it was relevant for the jury to have before it Vick's affidavit of November 8.[15] Similarly, in evaluating the government's conduct and determining whether there was substance to the claim that Sheridan had devised an intricate trap for petitioner, it was relevant for

[15] Petitioner errs in assuming that Vick's affidavit was nothing more than an inadmissible prior consistent statement. First, it was a statement made contemporaneously with the events and it therefore had substantially more probative value—particularly when specific dates became an issue, as they did at trial—than a statement made substantially after the event. Second, it was a *sworn* statement, and that gave it an added measure of reliability. Finally, and most significantly, it was a statement made before Vick could possibly know what petitioner would say to him in subsequent recorded conversations. The fact that the content of the affidavit was corroborated by petitioner's *later* conversations with Vick gives it substantially greater credibility than a bare statement made after all opportunity for tests of reliability are gone. In other words, in giving this statement and asserting therein that juror Elliott had first been discussed on November 7, Vick was assuming a risk that his later recorded conversations with petitioner might show that they had discussed it before that date. The fact that the conversations were consistent with the earlier affidavit gives the affidavit credibility which an untested statement cannot have.

the jury to consider his testimony that he had flown to Nashville on hearing from Vick on November 7 (R. 167a) in light of the affidavit which Vick submitted on the following day. And in determining whether government counsel were acting properly in requesting Vick to see petitioner again with a recording device, it was appropriate for the jury to know the information on which the government believed this step to be necessary.

Government counsel agreed that a limiting instruction might be given to the jury with respect to Vick's affidavit (R. 662a). But petitioner's counsel, possibly preferring not to have the affidavit mentioned specifically at all, requested no such instruction and did not take up the government's suggestion (*ibid.*). Petitioner is hardly in a position now to object to the failure to give a limiting instruction.

Indeed, here as in the case of the judges' testimony, petitioner's only objection at trial was that the affidavit "could have been proven in chief" (R. 652a). The court observed, in response to that claim, that during the government's case in chief, petitioner had successfully objected to the introduction of Vick's affidavit (R. 662a; see R. 406a–408a). It was proper, therefore, for the Court to overrule the objection made at trial.

IV

PETITIONER'S CONDUCT CONSTITUTED A VIOLATION OF 18 U.S.C. 1503

Petitioner's final contention is that since there was no chance that the approach to juror Elliott could

ever be successfully accomplished, his statements to Vick could not amount to an offense under 18 U.S.C. 1503 (Pet. Br. 50–56). The argument is unsound for three distinct reasons: (1) It is based on a misapprehension of Vick's status. (2) It misreads the "currently accepted principles" (Pet. Br. 50) of the law of criminal attempt. (3) It overlooks the broader reach of 18 U.S.C. 1503, the statute involved in this case.

A. SUCCESS OF PETITIONER'S ORIGINAL SUGGESTION TO VICK WAS NOT "FACTUALLY IMPOSSIBLE"

Petitioner argues that since Vick testified that he never had any intention of communicating with Elliott (R. 135a, 260a), petitioner's suggestion that Vick speak with Elliott and "get him on our side" (pp. 39–40, *supra*) could not amount to an offense. In making this argument, petitioner overlooks the fact that Vick was not a government employee on November 7; nor had he (his oral assurance to Sheridan notwithstanding) prevented himself from successfully executing the bribery of a juror. When petitioner suggested to Vick on November 7 that he approach his cousin, Vick's decision not to do so was based either on ethical and legal grounds or—if petitioner's characterization of Vick as a "loathsome specimen" (Pet. Br. 37) is accurate—on petitioner's failure to promise Vick enough to buy his cooperation. The scheme was not, we submit, doomed to failure from the moment petitioner opened his mouth; there was a real chance that, notwithstanding his conversations with Sheridan, Vick might play a role in this attempt as he had done

in the abortive approach to Mrs. Harrison. In his capacity as private citizen, Vick rejected the suggestion made by petitioner and called Sheridan in Washington. From that point on, it is true, petitioner's scheme could not have been carried out successfully. That did not, however, retroactively make the attempt an impossible one—any more than a federal official's decision not to take a bribe makes the initial bribe offer an attempt at the impossible. See, *e.g.*, *Lopez* v. *United States*, 373 U.S. 427. This factor, we submit, distinguishes this case from those in which government employees are used as "decoys" to collect evidence against persons who are planning illegal conduct.

B. IF ESTABLISHED PRINCIPLES WERE APPLIED, "FACTUAL IMPOSSIBILITY" WOULD NOT BE A DEFENSE TO A CHARGE OF ATTEMPT BASED ON THIS EVIDENCE

Even if, contrary to the argument we have just made, the evidence established that Vick was merely a "decoy," and that petitioner's suggestion was doomed to failure from the outset, that would not, under currently accepted principles, entitle him to acquittal on the grounds of "impossibility." Petitioner's assertion that "impossibility precludes conviction for criminal attempt, whether such impossibility be legal or factual" (Pet. Br. 51) is simply a misstatement of the current weight of authority. Cases cited by petitioner in support of the proposition have either been disapproved by subsequent decisions and commentators or have involved peculiar circumstances excepting them from the usual rule that impossibility is *not* a defense.

The general rule that impossibility is *not* a defense to a charge of criminal attempt has been recognized by American and English commentators. See, *e.g.*, Perkins, *Criminal Law* (1957), pp. 489–490; Williams, *Criminal Law: The General Part* (2d ed. 1961), p. 635 ("Provided that other rules are satisfied, the law now is that an act will amount to an attempt although the commission of the meditated crime is impossible by the means chosen."). A partial listing of cases so holding, which constitute the overwhelming weight of authority, appears in the margin.[16]

---

[16] *State* v. *Mandel*, 78 Ariz. 226, 278 P. 2d 413 (1954); *People* v. *Arberry*, 13 Cal. App. 749, 114 Pac. 411 (1910); *People* v. *Camodeca*, 52 Cal. 2d 142, 338 P. 2d 903 (1959); *People* v. *Fiegelman*, 33 Cal. App. 2d 100, 91 P. 2d 156 (1939); *People* v. *Fratianno*, 132 Cal. App. 2d 610, 282 P. 2d 1002 (1955); *People* v. *Lanzit*, 70 Cal. App. 498, 233 Pac. 816 (1925); *People* v. *Lee Kong*, 95 Cal. 666, 30 Pac. 800 (1892); *People* v. *Siu*, 126 Cal. App. 2d 41, 271 P. 2d 575 (1954); *People* v. *Dogoda*, 9 Ill. 2d 198, 137 N.E. 2d 386 (1956); *People* v. *Huff*, 339 Ill. 328, 171 N.E. 261 (1930); *People* v. *Lyons*, 4 Ill. 2d 396, 122 N.E. 2d 809 (1954); *State* v. *McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924); *Commonwealth* v. *Kennedy*, 170 Mass. 18 48 N.E. 770 (1897); *Commonwealth* v. *McDonald*, 59 Mass. 365, 5 Cush. 365 (1850); *People* v. *Jones*, 46 Mich. 441, 9 N.W. 486 (1881); *State* v. *Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902); *State* v. *Scarlett*, 291 S.W. 2d 138 (Mo. 1956); *State* v. *Meisch*, 86 N.J. Super. 279, 206 A. 2d 763 (1965); *People* v. *Bennett*, 182 App. Div. 871, 170 N.Y. Supp. 718 (2d Dep't), affirmed, 224 N.Y. 594, 120 N.E. 871 (1918); *People* v. *Boord*, 260 App. Div. 681, 23 N.Y.S. 2d 792 (1st Dep't, 1940), affirmed, 285 N.Y. 806 (1941); *People* v. *Gardner*, 144 N.Y. 119, 38 N.E. 1003 (1894); *People* v. *Mills*, 178 N.Y. 274, 70 N.E. 786 (1904); *People* v. *Moran*, 123 N.Y. 254, 25 N.E. 412 (1890); *State* v. *Utley*, 82 N.C. 556 (1880); *Commonwealth* v. *Crow*, 303 Pa. 91, 154 Atl. 283 (1931); *Clark* v. *State*, 86 Tenn. 511, 8 S.W. 145 (1888); *State* v. *Damms*, 9 Wisc. 2d 183, 100 N.W. 2d 592 (1960); *United States* v. *Domingues*, 7 U.S.M.C.A. 485, 22 C.M.R. 275 (1957); *United States* v. *Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).

The principal common thread of the cases cited by petitioner is that most of them deal with situations in which the defendant would not have been committing a substantive offense if his plan had been carried into fruition. In *People* v. *Jaffe*, 185 N.Y. 497, 78 N.E. 169, for example, the defendant attempted to purchase goods which he believed to have been stolen but which had, in fact, been restored to their owners before they were offered to the defendant. The court reversed the defendant's conviction, noting that the "crucial distinction" between that case and prior "impossibility" cases was "that in the present case the act, which it was doubtless the intent of the defendant to commit, would not have been a crime if it had been consummated." 185 N.Y. at 500. The same may be said of the other cases which petitioner cites as instances of "legal impossibility" (Pet. Br. 51–52) [17] and of the cases involving attempts to bribe individuals who are not jurors in fact.[18] In each of these instances, the crime was entirely in the defendant's mind. Had he and those acting for him accomplished the acts they intended to accomplish, he would have committed no substantive offense. There is, therefore, some basis for hesitating before convicting him of an attempt.[19]

---

[17] *Booth* v. *State*, 398 P. 2d 863 (Okla. Cr.); *Wilson* v. *State*, 85 Miss. 687, 38 So. 46; *Marley* v. *State*, 58 N.J.L. 207, 33 Atl. 208; *People* v. *Teal*, 196 N.Y. 372, 89 N.E. 1086.

[18] *State* v. *Porter*, 125 Mont. 503, 242 P. 2d 984; *State* v. *Taylor*, 345 Mo. 325, 133 S.W. 2d 366.

[19] Notwithstanding this rationale, the *Jaffe* case and others like it have been subject to severe criticism. See, *e.g.*, Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 853–854 (1928);

The distinguishing features of the present case may be demonstrated by contrasting the facts in *Jaffe* with those in *People* v. *Gardner,* 144 N.Y. 119, 38 N.E. 1003, which the New York Court of Appeals discussed and distinguished in its *Jaffe* opinion. In *Gardner* the defendant was convicted of attempted extortion for having sought to extort money from the keeper of a house of prostitution who had, more than a month before the defendant approached her, agreed to act as a decoy for the police. The defendant's contention that it was, from the outset, impossible for him to inspire fear in his contemplated victim since she was acting on behalf of the police was squarely rejected by the court. The court observed that the state of the victim's mind "was unknown to the defendant. If it had been such as he supposed, the crime could have been and probably would have been consummated. His guilt was just as great as if he had actually succeeded in his purpose." 144 N.Y. at 124. The court then quoted from an earlier decision (*People* v. *Moran,* 123 N.Y. 254, 25 N.E. 412), in which it had held that "the question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design." 144 N.Y. at 124–125. In distinguishing *Gardner,* the court in *Jaffe* observed that this general rule is inapplicable "where, if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offense." 185 N.Y. at 502.

Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction,* 40 Yale L.J. 53, 77–78 (1930); Hall, *General Principles of Crimial Law* (1947), pp. 594–595.

The present case is obviously similar to *Gardner* and quite unlike *Jaffe*. The obstacle which made realization of petitioner's unlawful scheme "impossible" was the state of Vick's mind—the fact that he had agreed to inform the police, just as the keeper of the house of prostitution had done in *Gardner*. Elliott was, in fact, a juror, and if Vick had been otherwise disposed, petitioner's plan could have achieved its unlawful objective.

No case has been cited by petitioner, and none is known to us, in which a defense of impossibility was sustained on the ground that the person with whom an accused was involved in an illegal scheme, and through whom he hoped to achieve his purpose, was reporting to the government. Several decisions have held to the contrary.[20] Similarly, the fact that threats, false pretenses or bribe offers were addressed to undercover agents or decoys has never been held to warrant a defense of impossibility.[21] These decisions, we believe, together with the general rule—supported by overwhelming authority—that impossibility is not a defense to a charge of attempt, announce the "currently accepted principles of criminal law" (Pet. Br. 50) and govern this case.[22]

---

[20] *State* v. *Mandel*, 78 Ariz, 226, 278 P. 2d 413 (1954); *People* v. *Lanzit*, 70 Cal. App. 498, 233 Pac. 816 (1925); *People* v. *Mills*, 178 N.Y. 274, 70 N.E. 786 (1904).

[21] *People* v. *Heinrich*, 65 Cal. App. 510, 224 Pac. 466 (1924); *People* v. *Gardner*, *supra*; *People* v. *Boord*, 260 App. Div. 681, 23 N.Y.S. 2d 792 (1940), affirmed, 285 N.Y. 806 (1941).

[22] Of the other cases cited by petitioner (Pet. Br. 52), *Regina* v. *Gamble*, 10 Cox C.C. 545 (1867) is cited by Perkins, *Criminal Law* (1957), p. 491, as an illustration of the principle that

Petitioner concedes that the "impossibility" defense he urges is inconsistent with the view of the Model Penal Code, but argues that the Code is seeking to change existing law (Pet. Br. 55–56). The discussion and citation of extensive authorities in Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy,* 61 Col. L. Rev. 571, 578–585 (1961), refutes the assertion. The objective of this provision of the Model Penal Code is, to be sure, "to eliminate legal impossibility as a defense to an attempt charge" (*id.* at 578), but that expressed purpose does not mean that the defense of impossibility has been generally approved—or that it has ever been applied in circumstances such as these. Indeed, the authors of the cited article, after discussing a handful of decisions, observe (*id.* at 579), "Apart from the decisions previously mentioned—sometimes referred to as instances of 'legal impossibility,'—the claim of impossibility has proven to be a poor shield against criminal attempt charges." We submit that there is no reason for this Court to adopt the minority view, rejected by the leading contemporary experts in the area of the criminal law, in construing 18 U.S.C. 1503, a statute which was broadly designed to protect the integrity of the federal judicial system.

"[i]f attempting to discharge a *loaded* gun at another is made a felony by statute, this offense is not established by proof of an effort to shoot a person with a gun that was not loaded." *State* v. *Clarissa*, 11 Ala. 57, is contrary to *Commonwealth* v. *Kennedy*, 170 Mass. 18, 48 N.E. 770, and *State* v. *Glover*, 27 S.C. 602, 4 S.E. 564.

C. THE STATUTE INVOLVED IN THIS CASE REACHES WELL BEYOND THE LAW OF ATTEMPT

Finally, the most conclusive answer to petitioner's "impossibility" argument is that even if the facts of this case would warrant an acquittal of *attempt* charges on "impossibility" grounds, that defense is not available in light of the language and purpose of 18 U.S.C. 1503, the statute which petitioner was charged with having violated. Section 1503 makes it a felony not merely corruptly to influence or attempt to influence the administration of justice; it prohibits any "endeavor" (p. 2, *supra*).

In *United States* v. *Russell*, 255 U.S. 138, an indictment charged that the accused had gone to the home of a man on the jury panel and talked with his wife, asking her to question her husband on his attitude toward the defendants in an approaching criminal trial. He asked the juror's wife to report to him the result of such questioning, as the defendants did not want to pay money to the jurors unless it was known that they favored acquittal. A demurrer to the indictment was sustained, following which the government brought the case to this Court on a writ of error. In answer to the accused's argument that the allegations of the indictment "only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation," the Court said (255 U.S. at 143, emphasis added):

> The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay

> to accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror but at the "endeavor" to do so. *Experimental approaches to the corruption of a juror are the "endeavor" of the section.* Guilt is incurred by the trial—success may aggravate, it is not a condition of it.

Among the "technicalities * * * besetting the word 'attempt'" is the claim made here by petitioner—*i.e.*, that the state of mind of the person to whom he spoke rendered his attempt ineffectual. Cases decided since *Russell* have consistently applied the word "endeavor" broadly to encompass, whether successful or not, any "of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." *Catrino* v. *United States*, 176 F. 2d 884, 887 (C.A. 9). Squarely in point here is *United States* v. *Polakoff*, 121 F. 2d 333 (C.A. 2), in which the defendants approached an accused who had pleaded guilty and promised to obtain a reduced sentence for him in exchange for a certain payment. The accused was actually acting as an informer for the Narcotics Bureau; he negotiated with and paid the defendants upon the instructions of the Bureau. After one of the two defendants made false representations to an Assistant United

States Attorney, they were both arrested and charged with violating 18 U.S.C. 1503. The court of appeals observed that "it is clear that the attempted use of influence was doomed to failure from the beginning, since Kafton and the attorney and the government officials were working together and were fully apprised of all the facts which the defendants were concealing except where their purpose required disclosure." 121 F. 2d at 334. Nonetheless, noting that under the statute "the corrupt endeavor alone is twice forbidden" (*id.* at 335), the court affirmed the convictions. See also *United States* v. *Mannarino,* 149 F. Supp. 351, 352 (W.D. Pa.) ("* * * it matters not that the endeavor was absolutely ineffective.")

In *Caldwell* v. *United States,* 218 F. 2d 370, 371 (C.A. D.C.), certiorari denied, 349 U.S. 930, the defendant was convicted of obstruction of justice on proof that he offered money to an intermediary "to talk with the jurors, feel them out and see how they felt towards the particular case." There was no testimony as to the defendant's motive or proof that the intermediary had accepted any money or approached any juror. And in *Knight* v. *United States,* 310 F. 2d 305, 307 (C.A. 5), the act of the defendant in offering money to a third person to place some illegal whiskey in the bar of a potential witness who was on probation was held to constitute an endeavor to obstruct justice, even though the offeree declined to go through with the arrangement. The court pointed out that "success or failure of the endeavor was immaterial." See also *Anderson* v. *United States,* 215 F. 2d 84 (C.A. 6), certiorari denied *sub nom. Lewis* v. *United States,* 348

U.S. 888; *Hicks* v. *United States*, 173 F. 2d 570 (C.A. 4), certiorari denied, 337 U.S. 945.

The only case cited by petitioner and known to us in which 18 U.S.C. 1503 was held inapplicable to a corrupt course of conduct touching upon the administration of justice is *Ethridge* v. *United States*, 258 F. 2d 234 (C.A. 9). The defendant in that case offered to intercede with the judge on behalf of a convicted defendant in exchange for a $1,000 payment. The victim did not believe the accused, and the court apparently concluded that there was no proof that the accused ever intended to do the things he promised to do. 258 F. 2d at 236. On these facts, the court of appeals correctly concluded that there was no attempt or endeavor to obstruct the administration of justice since the defendant had, in fact, no purpose of engaging in that particular substantive offense. His intent, which is, of course, relevant in determining whether he has committed an endeavor or an attempt, was not at all directed to obstruction of justice;[23] as the court observed, his "only 'endeavor' * * * was the unilateral and futile effort * * * to extract some 'easy money' from Walters." 258 F. 2d at 236.[24] The

[23] As we noted previously, the majority rule regarding attempts is that the guilt of the defendant "is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design." *People* v. *Moran*, 123 N.Y. 254, 25 N.E. 412 (p. 63, *supra*).

[24] Petitioner analogizes this case to *Ethridge* because "Vick never had the slightest intention * * * of ever talking to or getting in touch with Elliott" (Pet. Br. 53). Obviously, the critical question is not Vick's intention but petitioner's, and it is entirely clear that petitioner—unlike the defendant in *Ethridge*—had every intention of corruptly obstructing justice.

Ethridge case does not apply, we submit, where the intent of the defendant is as it was here—corruptly to obstruct justice by offering a bribe to a juror.[25]

The principle that the word "endeavor" should be broadly construed is clearly supported by sound reasons of policy. Obstructions of justice such as bribery of jurors or witnesses are, if successful, extremely difficult to detect. Unlike crimes of violence or those in which individuals are directly defrauded, there is unlikely to be a complaining party if the scheme succeeds. The briber, his intermediaries and the person bribed are likely to be satisfied with the results of their efforts, and the party who has improperly lost his lawsuit will be unable ever to learn why. Consequently, if the offense is to be deterred, it is essential that it be punishable even if caught at its very earliest stages. It is precisely when one engaged in such an endeavor confides in, and seeks the assistance of, another who is not prepared to join the illegality that such schemes may be discovered. If the originator of the scheme were then permitted to defend on the ground of impossibility, the most realistic deterrent would be lost.

---

[25] The fact that the juror here was only a prospective juror and not one who was already sitting does not withdraw this case from the scope of 18 U.S.C. 1503. The statute protects prospective jurors as well as those in the jury box. *Calvaresi* v. *United States*, 216 F. 2d 891, 898 (C.A. 10), reversed on other grounds, 348 U.S. 961; see *United States* v. *Russell*, 255 U.S. 138, 143; cf. *Ward* v. *United States*, 296 F. 2d 898 (C.A. 5); *Roberts* v. *United States*, 239 F. 2d 467, 470 (C.A. 9) (prospective witness); *United States* v. *Mannarino*, 149 F. Supp. 351 (W.D. Pa.) (prospective witness).

CONCLUSION

For the foregoing reasons we submit that the judgment below should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
NATHAN LEWIN,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

SEPTEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966